No. 95109-8

SUPREME COURT
OF THE STATE OF WASHINGTON

HEALTH PROS NORTHWEST, INC., a Washington corporation,

APPELLANT,

v.

THE STATE OF WASHINGTON and its DEPARTMENT OF CORRECTIONS,

RESPONDENTS.

APPELLANTS HEALTH PROS NORTHWEST, INC.'S OPENING BRIEF

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I. INTRODUCTION

In enacting the Public Records Act, the Legislature has mandated that agencies **promptly** disclose public records. See RCW 42.56.080 (agencies shall, upon request for identifiable public records, make them "**promptly** available to any person") (emphasis added); RCW 42.56.100 (agencies' rules shall "provide for . . . the **most timely possible action** on requests") (emphasis added); RCW 42.56.520 ("responses to requests for public records shall be made **promptly** by agencies . . . ") (emphasis added). In furtherance of this mandate, the Legislature has required every agency, within five business days of receiving a public records request, to "provid[e] a reasonable estimate of the time the agency . . . will **require** to respond to the request." RCW 42.56.520(1)(c) (emphasis added).

The Legislature has also expressly provided records requestors with the right to obtain the assistance of the courts when an agency fails to make a reasonable estimate of the time the agency **requires** to respond to a public records request, such that the agency fails to **promptly** make records available:

> Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency **requires** to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof

> shall be on the agency to show that the estimate it provided is reasonable.

RCW 42.56.550(2) (emphasis added).

In response to Health Pros Northwest, Inc.'s (hereinafter "Health Pros") public records request, the Department of Corrections (hereinafter "the agency") refused to provide an estimate of when it would respond to Health Pros' request. But, the agency is producing records at a pace that demonstrates that it will not fully respond to the request for more than 12 years, when production of the requested records will no longer be meaningful.

Health Pros filed an action in superior court seeking relief under RCW 42.56.550(2). The trial court refused to apply RCW 42.56.550(2), or grant Health Pros any relief with respect to the agency's refusal to provide an estimate of when it would fully respond to the request.

Instead, following *Hobbs v. State*, 183 Wn.App. 925, 335 P.3d 1004 (2014), the trial court interpreted RCW 42.56.520(1)(c)[1] and 42.56.550(2) as limiting the jurisdiction conferred on it, in a case where the agency chooses to provide records in installments, to review of the

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[1] Effective July 23, 2017, RCW 42.56.520(3) was recodified at RCW 42.56.520(1)(c). The substance of this provision did not change. See 2017 Wash. Laws, Ch. 303, Sec. 3 (Appendix E). The parties referred to RCW 42.56.520(3) in their briefing to the trial court, and the trial court referred to RCW 42.56.520(3) in its judgment. Health Pros uses the current citation, RCW 42.56.520(1)(c) in this brief.

agency's estimate of when it would provide *its initial installment of records only*:

> 3. The Court DECLARES that RCW 42.56.520(3),[2] as construed by the Court of Appeals in *Hobbs v. State*, 183 Wn.App. 925, 335 P.3d 1004 (2014), only requires an agency to provide an estimate of when it will produce its *first* installment of records responsive to the public records request, and does not require the agency to produce an estimate of when it will *finish* producing records responsive to such a request, such that the Court has no jurisdiction to compel the agency to provide such an estimate.

Judgment in Public Record Act Case, p. 5, ¶20; p. 7, ¶3 (emphasis in original).

The Court should reverse. Consistent with RCW 42.56.550(2)'s plain language, the Court should hold that agencies which choose to provide records in installments must provide an estimate of when the agency expects to fully respond to a public records request, hold that RCW 42.56.550(2) confers jurisdiction on trial courts to review the reasonableness of that estimate, and hold that the burden of proving the reasonableness of that estimate is on the agency. The Court should also award Health Pros its attorney's fees.

II. ASSIGNMENT OF ERROR

The trial court erred in summarily ruling that the jurisdiction conferred on it pursuant to RCW 42.56.550(2) was limited to a review of

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[2] See Footnote 1.

the reasonableness of the agency's estimate of when it would produce the first in the series of installments of records responsive to a public records request.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Did the Legislature intend RCW 42.56.520(1)(c) to require agencies that respond to public records requests in installments to provide an estimate of when the agency expects to *fully* respond to a public records request? And did the Legislature intend RCW 42.56.550(2) to give trial courts jurisdiction to review whether that estimate is reasonable, and intend to put the burden on the agency to demonstrate to the trial court that the estimate it has provided is reasonable? Or did the Legislature intend to require an agency that responds to a public records request by providing records in installments only to provide an estimate of when the agency intends to produce its *initial* installment of records and to limit the trial court's jurisdiction to reviewing the reasonableness of its estimate of when the agency will provide its initial installment of records, only?

Short answer: Consistent with the Public Records Act's purpose of requiring agencies to provide broad and prompt responses to public records requests, the Legislature intended to require agencies to

provide an estimate of when they would fully respond to a public records request, intended to grant trial courts jurisdiction to review the reasonableness of that estimate, and intended to put the burden of demonstrating the reasonableness of that estimate upon the agency making it.

IV. STATEMENT OF THE CASE

A. Request for records and response.

On February 10, 2017, Health Pros submitted a public records request to the agency. CP 14-18. The public records request was detailed and carefully worded in order to ensure that Health Pros obtained all records related to a 2014 contract that Health Pros had entered into with the agency to supply medical personnel to the agency. *Id.*

On February 15, 2017, the agency's public records officer provided an initial response to the request. CP 19-26. As part of its initial response, the Agency did not provide any estimate of when it expected either to provide the first installment of records, or when it expected to fully respond to Health Pros' records request. CP 25. Instead, the Agency vaguely stated that it would: "respond further to the status of [Health Pros'] request within 45 business days, on or before April 20, 2017." *Id.*

B. First installment.

Health Pros heard nothing further from the Agency until April 11, 2017. On that date, the agency's public records officer sent Health Pros an email stating that a compact disc containing records responsive to the request would be mailed upon the Agency's receipt of $1.77 to cover the cost of providing and mailing the compact disc. CP 32.

Health Pros' attorney promptly mailed payment. CP 34. He also requested the following information:

> [P]lease advise (1) how many installments you expect to produce before the response is complete; and (2) when you expect to produce each installment.

CP 31.

The Agency's public records officer refused to provide this information. Instead, she responded as follows:

> How our process works is, we offer one installment at a time. The Specialist does not continue to work on the request until payment for that installment is received.

Id.

Health Pros' attorney promptly objected to the Agency's failure to provide a reasonable estimate of the date by which the Agency would produce all responsive records. CP 29-30.

The Agency still refused to provide any estimate. Instead, the Agency stated that if Health Pros were dissatisfied with the agency's

response, Health Pros should file an administrative appeal. CP 25. The Agency provided Health Pros' attorney with an administrative appeal form. *Id.* However, the form itself stated that the Agency would not entertain administrative appeals addressed to the amount of time the Agency was taking to respond to a request. CP 27-28. See also WAC 137-08-140 (administrative review available only for decision denying disclosure, not for claims directed at pace at which agency is producing records).

On April 19, 2017, the Agency in fact provided Health Pros with a first installment of 673 pages of records. CP 35.

In order to avoid delays associated with its obligation to make payment for the cost of supplying and mailing future compact discs, Health Pros tendered a check in pre-payment of the next 10 installments of records. CP 39. Without offering any reasonable explanation for its action, the agency returned the check, stating that it would not accept pre-payment. CP 40.

C. Complaint.

Dissatisfied with the agency's refusal to provide an estimate of when it expected to fully respond to Health Pros' public records request, and the slow pace at which the agency was responding, Health Pros Northwest filed this lawsuit.

Health Pros' Complaint invoked RCW 42.56.550(2), which provides:

> Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

CP 7.

D. Additional installments.

After being served with the Complaint, the Agency continued to produce installments of records in response to Health Pros' Public Records Act request. On May 22, 2017, Health Pros received a second installment of 1,633 pages of records. CP 247. On July 3, 2017, Health Pros received a third installment of 9,119 pages of records. *Id.* On August 22, 2017, Health Pros received a fourth installment of 4,306 pages of records. *Id.*

E. Trial court proceedings and decision.

The trial court scheduled a hearing date and set a briefing schedule. CP 10-11. In its brief, the agency categorically refused to provide any estimate of when it expected to fully respond to Health Pros' public records request. CP 209 (asserting the agency "has no obligation under the PRA to provide [Health Pros] a completion date for [the agency's] responses under *Hobbs v. State Auditor* . . . .").

However, the agency asserted that it had, in the seven months between its receipt of the request and the date of the trial court hearing, reviewed and produced 15,531 pages of responsive records. CP 221. The agency stated that it had at least 350,000 additional pages of records to review and produce before it fully responded to Health Pros' request. *Id.*

Therefore, although the agency refused to estimate when it would fully respond to Health Pros' records request, it provided sufficient data from which an estimate may be made. Assuming the agency continues to produce records at the pace of approximately 15,000 pages every six months, **it will take the agency about 12 years to fully respond to Health Pros' public records request.**

After argument, the trial court entered a judgment.[3] With respect to the issue of whether the agency had a duty to provide Health Pros an estimate of when the agency intended to fully respond to Health Pros' public records request, and whether the court had jurisdiction to review the reasonableness of that estimate, the court entered the following finding:

> 20. The Court finds that pursuant to the decision in *Hobbs* that there is no requirement under the Public Records Act that an agency is required to provide the reasonable date of final completion of production of all the documents sought.

[3] Appendix F.

CP 249. Based on that conclusion, the court entered the following declaratory judgment:

> 3. The Court DECLARES that RCW 42.56.520(3),[4] as construed by the Court of Appeals in *Hobbs v. State*, 183 Wn.App. 925, 335 P.3d 1004 (2014) only requires an agency to provide an estimate of when it will produce its *first* installment of records responsive to the public records request, and does not require the agency to produce an estimate of when it will "finish" producing records responsive to such a request, such that the Court has no jurisdiction to compel the agency to provide such an estimate.

CP 251.[5] Health Pros timely filed a notice of appeal.[6]

V. STANDARD OF REVIEW

"Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550(3).

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[4] Now RCW 42.56.520(1)(c). See Footnote 1.

[5] The trial court found for Health Pros on one issue. The trial court held that, even under the *Hobbs* decision, the agency had the burden of providing Health Pros with a reasonable estimate of when it would produce its *initial* installment of records. The trial court held that the agency's statement that the agency would "respond further to the status of [Health Pros'] request within 45 business days" did not actually promise, state or describe when the agency would begin producing records, and thus did not comply with the requirement that it provide a reasonable estimate of when it will produce its initial installment of records. The trial court awarded Health Pros the attorney's fees it incurred establishing the agency's violation of this requirement. After Health Pros filed a motion asking the trial court to quantify the amount of attorney's fees to be awarded, the parties stipulated that the court should award Health Pros $10,000 in attorney's fees and $212.50 in costs. CP 245, 248, 250.

[6] Appendix G.

VI. ARGUMENT

A. In enacting the Public Records Act, the Legislature mandated the **prompt** disclosure of public records.

In enacting the Public Records Act, the Legislature stated:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for people to know and what is not good for them to know. The people insist on remaining informed so that they maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030. The Legislature has further mandated that courts are required to "take into account the policy . . . that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).

In the Public Records Act, the Legislature has also mandated the **prompt** disclosure of public records. The Legislature has directed: "Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, **make them promptly available** to any person. . . ." RCW 42.56.080 (emphasis added). The Legislature has required agencies to "adopt and enforce reasonable rules

and regulations. . .," which "shall provide for . . . **the most timely possible action on requests for information**." RCW 42.56.100 (emphasis added). The Legislature has directed that: "Responses to requests for public records shall be made **promptly** by agencies . . . " RCW 42.56.520 (emphasis added).

The Legislature has provided that agencies should normally produce records in response to a Public Records Act request within five business days of receiving the Public Records Act request. RCW 42.56.520. The Legislature has required that, in every case, an agency receiving a Public Records Act request must, within five business days, acknowledge that the agency has received the request and provide "**a reasonable estimate of the time that the agency will require to respond to the request**." RCW 42.56.520(1)(c) (emphasis added).

The dictionary defines "prompt" as: "1. Ready and quick to act as occasion demands: responding instantly," and "2. Performed readily or immediately: given without delay or hesitation."[7] Therefore, interpreting this statute in light of the Legislature's repeated directive that agencies respond "promptly," the Court should hold that an agency's estimate of the time required to respond to a Public Records Act request is reasonable

[7] Webster's Third New International Dictionary (Unabridged) at 1816 (1961).

only if it provides for that minimum time required to produce all records "immediately" and "without delay."

Moreover, an agency is not entitled to justify its less-than-prompt response by asserting that it would be inconvenient or difficult for it to provide a prompter response:

> It has long been recognized that administrative inconvenience or difficulty does not excuse strict compliance with public disclosure obligations.

Gendler v. Batiste, 174 Wn.2d 244, 274 P.3d 346 (2012), citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131-32, 580 P.2d 246 (1978).

Here, pursuant to the plain language of RCW 42.56.520(1)(c), the agency has a duty to provide a **prompt** response to Health Pros' public records request.

B. Under RCW 42.56.550(2), the agency has the burden of producing an estimate of the time required promptly to respond to the records request, and of establishing that its estimate is reasonable.

The Legislature has provided that persons who make Public Records Act requests, and who believe an agency is not **promptly** responding to such a request, have the right to apply to Superior Court to have the agency appear and show that its estimate of the time that it **requires** to respond to the Public Records Act request is reasonable:

> Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency **requires** to respond to a public record request, the superior court in the county in which the record is

> maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

RCW 42.56.550(2) (emphasis added).

This statute imposes two burdens upon an agency responding to a public records request. First, the agency has the burden of providing an estimate of the time required to respond to the records request. See also RCW 42.56.520(1)(c) (requiring agencies to provide "a reasonable estimate of the time the agency . . . will require to respond to the request."). The word "required" plainly must be construed in light of the Legislative mandate that public records requests be responded to "promptly." Second, the Legislature has put the burden on the agency, pursuant to RCW 42.56.550(2), to show that the estimate it provided is reasonable.

Here, the agency is in breach of these duties. At the time of the hearing before the Superior Court in September, 2017, some six months after Health Pros submitted its public records request, the agency continued to flat-out refuse to provide an estimate of when it would respond to Health Pros' records request. CP 209. But the agency is producing records at a pace pursuant to which it will take **about 12 years** for the agency to provide all responsive documents—a time when the

documents will no longer be meaningful. See CR 221 (the agency asserts that between February 2017 and September 2017 it has reviewed and produced 15,831 pages of records, and asserts that it has at least an additional 350,000 pages of records to review and produce). That is not a "prompt" response.

The trial court should have required the agency to provide an estimate of when it expects to fully respond to Health Pros' public records request. The trial court should have then, as required by RCW 42.56.550(2), reviewed that estimate, placing the burden on the agency to demonstrate that its estimate was reasonable. And, assuming the Agency estimated it would take 12 years to respond to Health Pros' public records request—a time when the records being produced would no longer have any practical meaning—the trial court should have determined that the Agency's estimate was not reasonable, and required the Agency to take the actions necessary (such as requiring the agency to assign more than one "records specialist" to the request) to produce responsive records promptly. Because the trial court refused to do any of this, this Court should reverse the decision of the trial court and remand with instructions that it take these actions.

C. In *Hobbs v. State*, 183 Wn.App. 925, 335 P.3d 1004 (2014), the Court of Appeals incorrectly held that the Legislature only required an agency to provide an estimate of when the agency intended to produce its *initial* installment of records. This Court should overrule this holding.

The Legislature's intent in these statutes is plain, as is the fact that the agency is not acting in a manner consistent with that intent. Nevertheless, the trial court believed itself constrained to deny Health Pros relief pursuant to the Court of Appeals' decision in *Hobbs v. State*, 183 Wn.App. 925, 335 P.3d 1004 (2014).

Following *Hobbs*, the trial court concluded that the agency producing records in installments needed only to provide an estimate of when it would produce its *initial* installment of records, and that the trial court had jurisdiction only to review the agency's estimate of the date it would provide the *initial* installment of records:

> 3. The Court DECLARES that RCW 42.56.520(3),[8] as construed by the Court of Appeals in *Hobbs v. State*, 183 Wn.App. 925, 335 P.3d 1004 (2014), only requires an agency to provide an estimate of when it will produce its *first* installment of records responsive to the public records request, and does not require the agency to produce an estimate of when it will *finish* producing records responsive to such a request, such that the Court has no jurisdiction to compel the agency to provide such an estimate.

CP 251.

[8] Now RCW 42.56.520(1)(c). See Footnote 1.

Hobbs involved a public records request submitted to the state auditor's office for certain records related to the investigation of a whistleblower complaint. 183 Wn.App. at 929, ¶12. The state auditor's office advised the requestor that the records would be provided in installments. *Id.*, ¶3. It then produced the first installment. *Id.*, ¶4. Just two days after providing this first installment, the requestor filed a lawsuit. *Id.*

RCW 42.56.550(1) authorizes a court to review *the substance* of an agency's response to a public records request, determine whether an agency submitted responsive documents in a reasonable format, and determine whether the agency properly redacted and/or withheld records responsive to the request, and to award penalties. Pursuant to this statute, the complainant objected to the form in which the agency had produced documents, and asked the court to review the propriety of redactions contained in the first installment of records produced. 183 Wn.App. at 932, ¶12. The plaintiff records requestor then alleged additional claims as the state auditor's office continued to produce installments of records. 183 Wn.App. at 932-34, ¶12-18.

In *Hobbs*, the Court of Appeals held that the requestor's lawsuit had been filed prematurely. *Id.* at 935, ¶22-24. The Court held that no claim for relief lies under RCW 42.56.550(1) until an agency has taken

"final agency action" by producing all records the agency intends to produce in response to a Public Records Act request. *Id.*

In addition, in *Hobbs,* the Court of Appeals held that no claim will lie against an agency for a Public Records Act violation when the agency has acted to cure any defect in its production of documents before the agency produces all the records it intends to produce, and thereby takes "final agency action." *Id.* at 937-41, ¶25-33.

These parts of the court's decision in *Hobbs* make perfect sense. Applied here, they mean that Health Pros cannot file a lawsuit challenging the format in which the agency is producing records, challenging the agency's decision to redact specific records, or ask a court to consider imposing penalties, until the agency has fully responded to Health Pros' public records request by producing all the records the agency intends to produce.

However, the court in *Hobbs* made a third ruling. It addressed RCW 42.56.520(1)(c), which requires an agency producing records in installments to:

> [P]rovid[e] a reasonable estimate of the time the agency . . . will require to respond to the request . . .

At the time the *Hobbs* court acted, the Legislature had charged the Washington State Attorney General with enacting model rules for state

agencies to use in responding to public records requests. RCW 42.56.570(2). In the model rules, the Attorney General had interpreted this language as requiring agencies to provide their best estimate of when they expected to **fully** respond to a public records request:

> Within five business days of receiving a request, an agency must provide an initial response to the requestor. The initial response must do one of four things:
>
> (a) Provide the record;
>
> (b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to **fully** respond;
>
> (c) Seek a clarification of the request; or
>
> (d) deny the request . . .

WAC 44-14-04003(4) (emphasis added).

Similarly, the authors of Washington's Public Records Act Deskbook interpreted this statute in a similar manner:

> The agency must provide its initial response within five days. When the agency cannot complete its response within that five-day period and needs no clarification, the agency can take a "reasonable" amount of time to complete the request, but must provide this "reasonable" time estimate to the requestor.
>
> . . .
>
> The reasonable time estimate should include both the date of the first installment, if there will be installments, and the date the agency estimates the request will be completed.

Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meeting Laws at §6.5 at p. 6-22 (2d ed., 2014).[9]

Thus, at the time of the Court of Appeals decision in *Hobbs*, agencies responding to public records requests understood they were obliged to, and in fact routinely provided estimates of, when they expected to **fully** respond to the request.

The Court of Appeals in *Hobbs* did not appear to be aware of these authorities and this practice. Instead, the Court of Appeals interpreted RCW 42.56.520(1)(c) as only requiring that an agency which chooses to provide records in installments provide a requestor with an estimate of when it would produce its **initial** installment of responsive records, only. The court in *Hobbs* held that an agency had no obligation to provide an estimate of when it would **fully** respond:

> Under the PRA, there are two ways for an agency to "respond" to a public records request. The agency can (1) make the records available for inspection or copying or (2)

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[9] In a comment, the authors of the Deskbook recognize that because it must be provided within five days of the request, an agency's initial estimate may be speculative and subject to revision:

> With some larger requests, the completion date will be fairly speculative at an early stage, and therefore an exact date is not required. Nevertheless, some time range should be included. The agency may want to highlight the speculative nature of the estimate and provide a date when it would expect to have a more accurate estimate. For any large request, however, original estimates may be revised frequently.

Id. (comment at bottom of p. 6-22).

> respond by including an explanation of the exemption authorizing the agency to withhold the record. See *Rental Hous. Ass'n*, 165 Wn.2d at 535 (quoting RCW 42.56.210(1) and (3). The plain language of RCW 42.56.520 requires that the agency provide a reasonable estimate of the time required to respond to the request. Here, the Auditor provided a reasonable estimate of the time required to respond to Hobbs' public records request; the Auditor stated it would provide the first installment of records by December 16. As noted, an agency can make the records available on an installment basis. RCW 42.56.080. Because the Auditor complied with the plain language of RCW 42.56.520, we hold that the superior court did not err in finding that the Auditor complied with the prompt response requirement of the PRA.
>
> However, Hobbs asks us to read additional language into RCW 42.56.520. Specifically, he asks us to interpret RCW 42.56.520 as requiring the agency to provide an estimate of the reasonable amount of time needed to fully or completely respond to the request. When interpreting a statute, "we 'must not add words where the legislature has chosen not to include them.'" *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). Accordingly, we will not interpret RCW 42.56.520 to require agencies to provide an estimate of when it will fully respond to a public records request when the legislature has declined to include such language in the statute.

183 Wn.App. at 942-43, ¶36-37. This part of the decision in *Hobbs* is flawed, and should be overruled.

The Court of Appeals in *Hobbs* misinterpreted the plain meaning of the Legislature's language. In RCW 42.56.520(1)(c), the Legislature required an agency to provide "a reasonable estimate of the time required to respond to the request." The most natural reading of this phrase is to

treat it as referring to the whole of what the Legislature described—as requiring an estimate of *all* of the time required to respond to a public records request. It is not to construe it as referring to only a tiny subsection of what the Legislature described—the time necessary to provide merely the *initial* installment of responsive records.

The Court in *Hobbs* criticized Hobbs' interpretation of the language of RCW 42.56.520(1)(c) on the grounds that it added the word "fully" before the word "respond," something which the court in *Hobbs* claimed one may not do. *Hobbs*, 183 Wn.App. at 943, ¶37. But the Court of Appeals in *Hobbs* itself interpreted this phrase as if the Legislature had included the word "initially" before the word "respond." Therefore the Court of Appeals' construction of this language is subject to *exactly* the same criticism which the Court of Appeals directed at Hobbs' construction. And, other than its obvious irritation at Hobbs' decision to prematurely file his lawsuit, the court in *Hobbs* gave no principled reason for choosing to add the word "initially" to the statute, rather than the word "fully."

The principle this Court should employ in construing the Public Records Act is that of effectuating the Legislature's intent of ensuring full access to public records. *Gendler v. Batiste*, 174 Wn.2d 244, 251-52, 274 P.3d 346 (2012); *Bainbridge Island Police Guild v. City of Puyallup*, 172

Wn.2d 398, 407-08, 259 P.3d 190 (2011); *Burt v. State Department of Corrections*, 168 Wn.2d 828, 832, 835, 231 P.3d 191 (2010); *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2004); *Newman v. King County*, 133 Wn.2d 565, 570-71, 947 P.2d 217 (1997); *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997); *Progressive Animal Welfare Soc'y v. University of Washington (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994); *Brouillet v. Cowles Publ'g Company*, 114 Wn.2d 788, 793, 791 P.2d 526 (1990). The Legislature intended agencies to disclose records promptly. RCW 42.56.080; .100; .520. The Court of Appeals in *Hobbs* did not consider whether its interpretation of the Act would further the fundamental legislative purposes that lie behind the Act.

Requiring agencies to provide an estimate of the time required to **fully** respond to a public records request, in light of the mandate that agencies **promptly** respond to each public records request, and authorizing trial courts to conduct a review limited to the issue of the reasonableness of that estimate, provides for meaningful review of the pace at which an agency is producing documents. This fulfills the Legislature's purpose by ensuring that trial courts are authorized to review whether an agency is responding to a public records request **promptly**, as the Legislature has mandated.

The construction which the trial court, following *Hobbs*, felt compelled to adopt undercuts, rather than advances, this Legislative purpose. It precludes courts, after the agency has produced an initial installment of records responsive to a request, from reviewing an agency's actions to see if the agency is responding "promptly," as the Legislature has mandated.

The *Hobbs* court's interpretation of RCW 42.56.550(2) creates a "jurisdictional gap." Under the *Hobbs* decision, trial courts have jurisdiction *only* to review the reasonableness of the agency's estimate of when it will produce its *initial* installment of records. The trial courts then lose jurisdiction under RCW 42.56.550(2). The trial courts later reacquire jurisdiction under RCW 42.56.550(1), but only once the agency takes "final agency action" by producing all the records it intends to produce. See *Hobbs*, 183 Wn.2d at 935, ¶22-24.

In other words, under the *Hobbs* decision, trial courts are left with no jurisdiction over a public records request after the agency's production of an initial installment of records. At that point, trial courts lose jurisdiction to review the pace at which an agency is responding to a public records request, and lose the power to ensure the agency is responding "promptly."

This means that an agency can, as long as it promptly provides a first installment of records, avoid court oversight by thereafter dribbling out records in installments over a lengthy period of time, such that the records, when finally produced, are no longer meaningful. This means the agency has the power to *de facto* deny a public records request—exactly as it is doing to Health Pros' request.

The *Hobbs* court's construction of the Public Records Act is thus **totally inconsistent** with the Legislature's purpose of ensuring full access to public records by providing responses to such requests "promptly."

Recognizing the problems of an interpretation creating such a "jurisdictional gap," the agency attempted to fill that gap by asserting that the trial court could review the "diligence" with which it was responding to Health Pros' request. See CP 228-230. But this is inconsistent with the language adopted by the Legislature in the Public Records Act.

The Legislature required agencies to respond to public records requests **promptly**. RCW 42.56.520. It directed agencies to **promptly** provide requestors an estimate of the time the agency **requires** to respond to a requestor's Public Records Act request. RCW 42.56.520(1)(c). It authorized courts to review whether that estimate is reasonable, putting the burden of establishing reasonableness upon the agency. RCW 42.56.550(2).

The Legislature then authorized courts, once an agency has fully responded to a records request, to review the substance of the agency's response, review any claims of exemption or redaction the agency has made, and if appropriate, impose penalties. RCW 42.56.550(1). These two subsections are the only portions of the Act in which the Legislature conferred a right of review upon the courts.

The Legislature, in the Public Records Act, required agencies to act "promptly," not "diligently." The Legislature, in the Public Records Act, did not confer jurisdiction on the trial courts to review the "diligence" with which an agency, after producing its initial installment of records, is responding to a public records request. The agency should not be allowed to change the standard the Legislature adopted.

In asserting that the Court could review the "diligence" with which the agency was responding to the records request, the agency relied on a Division III Court of Appeals decision, *Andrews v. Washington State Patrol*, 183 Wn.App. 644, 334 P.3d 94 (2014). CP 228-30.

In *Andrews*, Division III addressed a records request to which an agency had fully responded by producing all requested records, together with a detailed redaction log. 183 Wn.App at ¶7, p. 649. Therefore, the court was applying the standards of review applicable under RCW

42.56.550(1), and not the standards applicable under RCW 42.56.550(2), the only statute under which Health Pros proceeded in this case.

The requestor in *Andrews* asserted that the agency had violated the Public Records Act, and that the requestor was entitled to penalties, because the agency, which ended up taking approximately three months to fully respond to the records request, had initially estimated it would only take 20 days to respond to the request. *Id.* at 647, ¶4; 649, ¶9. The agency explained that its departure from its initial estimate occurred because it had not initially realized that some of the materials requested involved recorded conversations of privileged communications between persons charged with a crime and that person's attorney. These materials required substantial effort to review and redact before production, thus accounting for the three-month response. *Id.* at 647, ¶5-648, ¶7.

In *Andrews*, Division III rejected the requestor's argument that the agency had violated the Act simply because it had not complied with its original estimate. The Court of Appeals in *Andrews* correctly noted that the Washington State Attorney General's model rules provide that "extended estimates are appropriate when the circumstances have changed." *Id.* at 652, ¶16, citing WAC 44-14-04003(6). The court held that because the agency had both explained the basis for its original estimate and explained the additional information that caused it to realize

that its original estimate was not reasonable, and to alter it, the agency had complied with the Act. 183 Wn.App. at 653, ¶21.

In its concluding paragraphs, the Court, in rejecting the suggestion that the agency should be penalized, and without citing to the Act, held that the agency had responded to the request "diligently." 183 Wn.App. at 653-54, ¶22. By casually using this word, the Court of Appeals in *Andrews* did not purport to adopt a new basis for reviewing agency action.

It is arguably appropriate, in a case in which a court is applying RCW 42.56.550(1), and hence reviewing whether the agency acted in good faith for the purpose of determining whether to impose penalties, to examine whether an agency acted "diligently." But that is manifestly not the standard which the Legislature has imposed with respect to records requestors who seek review of the reasonableness of an agency's estimated response date before the agency has fully produced records. The standard set by the Legislature is "promptness," not "diligence." That is the standard the trial court should have properly applied here.

In sum, the Legislature, in three different places in the Public Records Act, has required agencies to act "promptly" in responding to public records requests. RCW 42.56.080; .100; .520. Nothing in the Public Records Act authorized the agency to ask the trial court to substitute "diligence" for "promptness." The trial court erred by refusing

to require the agency to provide an estimate of when it expected to fully respond to Health Pros' public records request, by refusing to review, in light of the standard of "promptness," whether the agency had provided a reasonable estimate of the time required to respond, and in refusing to put the burden of proving the reasonableness of that estimate on the agency, all as the Legislature plainly required in RCW 42.56.550(2).

The Court should reverse and remand with instructions to the trial court to require the agency to provide its estimate of when it expects to fully respond to Health Pros' public records request, and to affirmatively establish the reasonableness of that estimate.

D. The Court should award Health Pros its reasonable attorney's fees and costs.

Finally, the Court should award Health Pros its reasonable attorney's fees and costs.

RCW 42.56.550(4) provides:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney's fees, incurred in connection with such legal action.

Here, the Court should determine that Health Pros has prevailed against an agency in an action seeking a right to receive an estimate of the time within which the agency intends to respond to Health Pros' public

records request. Therefore, the Court should hold—both before the trial court and on appeal—that Health Pros is entitled to an award of its reasonable attorney's fees under this statute.

VII. CONCLUSION

As part of the Public Records Act, the Legislature required agencies to respond to records requests "promptly." RCW 42.56.080; 42.56.100; 42.56.520.

The Legislature has further required agencies that choose to provide records in installments to also provide records requestors, within five business days of the request, with a "reasonable estimate of the time the agency . . . will require to respond to the request." RCW 42.56.520(1)(c).

The Legislature has also expressly provided records requestors with the right to obtain the assistance of the courts when an agency fails to make a reasonable estimate of the time that the agency **requires** to respond to a public records request:

> Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency **requires** to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

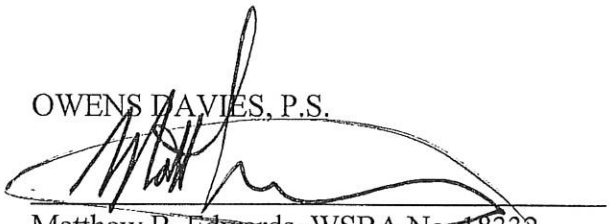
RCW 42.56.550(2) (emphasis added).

Here, the trial court erred by not following the Legislature's directives. The trial court should have required the agency to produce an estimate of when it intended to fully respond to Health Pros' public records request, and then required the agency to bear the burden of proving that its estimate was a reasonable estimate of the time required to respond to the request, in light of the Legislative mandate that records be provided promptly.

The trial court plainly erred by not adopting and applying the standards which the Legislature itself had specifically required. Instead, the trial court, following the Court of Appeals' decision in *Hobbs v. State*, 183 Wn.App. 925, 335 P.3d 1004 (2014), held that the agency had no duty to provide an estimate of when it proposed to fully respond to Health Pros' public records request, or to defend that estimate as reasonable. This Court should reverse this aspect of the Court of Appeals decision in *Hobbs*. It should return the law to the standards the Legislature enacted, and which the Legislature intended courts to apply.

The trial court's decision should be reversed. The case should be remanded. And, pursuant to RCW 42.56.550(4), the Court should award Health Pros all the attorney's fees it has incurred, both before the trial court and on appeal.

OWENS DAVIES, P.S.



Matthew B. Edwards, ~~WSBA No.~~ 18332
Attorney for Appellant Health Pros Northwest, Inc.

VIII. APPENDIX

A	RCW 42.56.080
B	RCW 42.56.100
C	RCW 42.56.520
D	RCW 42.56.550
E	2017 Wash. Laws, Ch. 303, Sec. 2
F	Trial Court Judgment
G	Notice of Appeal

EXHIBIT A

RCW 42.56.080

Identifiable records—Facilities for copying—Availability of public records.

(1) A public records request must be for identifiable records. A request for all or substantially all records prepared, owned, used, or retained by an agency is not a valid request for identifiable records under this chapter, provided that a request for all records regarding a particular topic or containing a particular keyword or name shall not be considered a request for all of an agency's records.

(2) Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW **42.56.070**(8) or **42.56.240**(14), or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received in person during an agency's normal office hours, or by mail or email, for identifiable public records unless exempted by provisions of this chapter. No official format is required for making a records request; however, agencies may recommend that requestors submit requests using an agency provided form or web page.

(3) An agency may deny a bot request that is one of multiple requests from the requestor to the agency within a twenty-four hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential functions of the agency. For purposes of this subsection, "bot request" means a request for public records that an agency reasonably believes was automatically generated by a computer program or script.

[**2017 c 304 § 2; 2016 c 163 § 3.** Prior: **2005 c 483 § 1; 2005 c 274 § 285; 1987 c 403 § 4; 1975 1st ex.s. c 294 § 15;** 1973 c 1 § 27 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.270**.]

NOTES:

Finding—Intent—2016 c 163: See note following RCW **42.56.240**.

Intent—Severability—1987 c 403: See notes following RCW **42.56.050**.

EXHIBIT B

RCW 42.56.100

Protection of public records—Public access.

Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records.

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.

[**1995 c 397 § 13; 1992 c 139 § 4; 1975 1st ex.s. c 294 § 16;** 1973 c 1 § 29 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.290**.]

EXHIBIT C

RCW 42.56.520

Prompt responses required.

(1) Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond in one of the ways provided in this subsection (1):

(a) Providing the record;

(b) Providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer;

(c) Acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request;

(d) Acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and asking the requestor to provide clarification for a request that is unclear, and providing, to the greatest extent possible, a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request if it is not clarified; or

(e) Denying the public record request.

(2) Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.

(3)(a) In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking.

(b) If the requestor fails to respond to an agency request to clarify the request, and the entire request is unclear, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Otherwise, the agency must respond, pursuant to this section, to those portions of the request that are clear.

(4) Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

[**2017 c 303 § 3; 2010 c 69 § 2; 1995 c 397 § 15; 1992 c 139 § 6; 1975 1st ex.s. c 294 § 18;** 1973 c 1 § 32 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.320**.]

NOTES:

Finding—2010 c 69: "The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online." [**2010 c 69 § 1.**]

EXHIBIT D

RCW 42.56.550

Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request or a reasonable estimate of the charges to produce copies of public records, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW **42.56.030** through **42.56.520** shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW **36.01.050** apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

[**2017 c 304 § 5; 2011 c 273 § 1.** Prior: **2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20;** 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.340**.]

NOTES:

Intent—Severability—1987 c 403: See notes following RCW **42.56.050**.

*Application of chapter 300, Laws of 2011: See note following RCW **42.56.565**.*

EXHIBIT E

Sec. 3. RCW 42.56.520 and 2010 c 69 s 2 are each amended to read as follows:

(1) Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond ((~~by either~~)) in one of the ways provided in this subsection (1):

(a) Providing the record;

(((~~2~~))) (b) Providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer;

(((~~3~~))) (c) Acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request;

(d) Acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and asking the requestor to provide clarification for a request that is unclear, and providing, to the greatest extent possible, a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request if it is not clarified; or

(((~~4~~))) (e) Denying the public record request.

(2) Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.

(3)(a) In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking.

(b) If the requestor fails to respond to an agency request to clarify the request, and the entire request is unclear, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Otherwise, the agency must respond, pursuant to this section, to those portions of the request that are clear.

(4) Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

EXHIBIT F

17-2-02480-34
JD 32
Judgment
1893741

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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2017 OCT -5 PM 12:38

Linda Myhre Enlow
Thurston County Clerk

☐ EXPEDITE
☒ Hearing is set:
Date: October 6, 2017
Time: 9:00 a.m.
Judge/Calendar: Hon. James J. Dixon
Civil Motions Calendar
☐ No Hearing is set

SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

HEALTH PROS NORTHWEST, INC., a Washington corporation,

Plaintiffs,

v.

THE STATE OF WASHINGTON and its DEPARTMENT OF CORRECTIONS,

Defendants.

NO. 17-2-02480-34

JUDGMENT IN PUBLIC RECORD ACT CASE GRANTING RELIEF IN PART AND DENYING RELIEF IN PART, AND AWARDING FEES AND COSTS

I. JUDGMENT SUMMARY

I.	Judgment Creditor	Health Pros Northwest, Inc.
II.	Attorney for Judgment Creditor	Matthew B. Edwards
III.	Judgment Debtor	The State of Washington and its Department of Corrections
IV.	Attorney for Judgment Debtor	Douglas W. Carr
V.	Principal Judgment Amount	Ø
VI.	Attorney Fees	$10,000.00
VII.	Costs	$212.50
VIII.	Pre-judgment Interest	Ø

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II. JUDGMENT

This matter came on regularly for hearing on Friday, September 8, 2017, and again on Friday, September 29, 2017.

At the hearing on Friday, September 8, 2017, the Plaintiff Health Pros Northwest, Inc. was represented by Matthew Edwards of Owens Davies, P.S. The Defendant State of Washington, and its Department of Corrections, was represented by Assistant Attorney General Tim Lang.

The Court considered the following pleadings:

1. Health Pros' Opening Brief;
2. Declaration of Matthew Edwards in Support of Health Pros' Opening Brief;
3. Response Brief of the Department of Corrections;
4. Declaration of Denise Vaughan;
5. Declaration of Erin Skewis;
6. Health Pros' Reply Brief.

In addition, the Court considered the other pleadings on file and the oral argument of counsel.

At the hearing on Friday, September 29, 2017, the Plaintiff Health Pros Northwest, Inc. was represented by Matthew Edwards of Owens Davies, P.S. The Defendant State of Washington and its Department of Corrections was represented by Assistant Attorney General Douglas W. Carr.

The Court considered the following pleadings:

1. Health Pros Northwest, Inc.'s Motion for an Award of Fees and Costs.
2. Declaration of Matthew Edwards in Support of Motion for an Award of Fees and Costs.
3. _____
4. _____
5. _____

Based on the foregoing, the Court FINDS, CONCLUDES, and ORDERS and ENTERS JUDGMENTS as follows:

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FINDINGS

1. Health Pros Northwest, Inc. (hereinafter "Health Pros") submitted a public records request to the Department of Corrections on February 10, 2017.

2. In its public records request, Health Pros asked for 19 categories of public records, all of which were related to a contract Health Pros entered into in 2014 with the Department of Corrections, the parties' performance of that contract, the agency's decision not to renew the contract, and/or the agency's entry into a similar contract with other vendors.

3. The agency provided its initial response on February 15, 2017. The agency's initial response stated "Department staff will begin to gather and identify records . . . I will respond further to the status of your request within 45 business days, on or before April 20th, 2017."

4. This initial response did not comply with RCW 42.56.520(3), because it did not provide a reasonable estimate of the time the agency would begin to produce records in response to the request.

5. On April 17, 2017, the agency produced a first installment of 673 pages of responsive documents.

6. Health Pros filed its Complaint in this matter on May 2, 2017. Health Pros served its Complaint on the agency later that same month. Health Pros' Complaint specifically invoked the Court's jurisdiction under RCW 42.56.550(2), only.

7. On May 22, 2017, the agency produced a second installment of 1,633 pages of responsive documents.

8. On July 3, 2017, the agency produced a third installment of 9,128 pages of responsive documents.

9. On August 22, 2017, after Health Pros had filed its Opening Brief in this matter, the agency produced a fourth installment of 4,306 pages of responsive documents.

10. Thus, as of September 8, 2017, the date of the hearing, the agency had produced a total of 15,740 pages of documents responsive to Health Pros' public records request.

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11. The agency states that it has at least an additional 350,000 pages of documents that it needs to review and potentially produce in response to the public records request.

12. Any finding of fact that is more properly described as a conclusion of law is hereby adopted as such.

III. CONCLUSIONS

FIRST ISSUE: ADEQUACY OF AGENCY'S "FIFTH-DAY RESPONSE"

13. RCW 42.56.520(1)(c) requires an agency that does not either produce all records responsive to, or deny, a public records request, within five days to:

> Acknowledg[e] that the agency . . . has received the request and provid[e] a reasonable estimate of the time the agency . . . will require to respond to the request;

14. Washington Administrative Code 44-14-04003 provides that as part of the five-day response, the agency must provide the requestor with a reasonable estimate as to when records will be provided. That code section further provides that if it becomes apparent that the deadline cannot be met, the agency shall provide a new estimate at its earliest opportunity.

15. In *Hikel v. City of Lynnwood*, 197 Wn.App. 366, 389 P.3d 677 (2016), the most recent case addressing this issue, the Court of Appeals emphasized that an agency's "fifth-day response" pursuant to RCW 42.56.520(3) must strictly comply with the statute, by providing a specific estimate of when the agency will begin producing records.

16. The agency's "fifth-day response" did not strictly comply with RCW 42.56.520(3) by providing Health Pros Northwest, Inc. with an estimated date on which the agency would begin producing records.

17. As the party prevailing on this issue, Health Pros Northwest, Inc. is entitled to an award of attorney's fees it incurred related to this issue.

SECOND ISSUE: AGENCY'S DUTY TO PROVIDE ESTIMATE OF WHEN IT WILL PRODUCE ALL RECORDS IN RESPONSE TO THE PUBLIC RECORDS REQUEST

18. RCW 42.56.550(2) provides:

> Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public

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> record request or a reasonable estimate of the charges to produce copies of public records, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

19. Health Pros Northwest, Inc. argues that pursuant to RCW 42.56.550(2), the agency is required to provide an estimate of the date of the final completion of production of all the documents sought and to establish the reasonableness of that estimate.

20. The Court finds that pursuant to the decision in *Hobbs* there is no requirement under the Public Records Act that an agency is required to provide a reasonable date of final completion of production of all the documents sought.

THIRD ISSUE: DILIGENCE WITH WHICH AGENCY IS PRODUCING RECORDS

21. In its response brief, the agency conceded that the Court is entitled to review the diligence with which the agency is producing records in response to the public records request. Agency Response Brief at 21 *et seq.*, citing *Andrews v. Washington State Patrol*, 183 Wn.App. 644, 651, 334 P.3d 94 (2014).

22. The Court determines whether an agency is acting with reasonable diligence by examining a variety of factors, including each of the following:

- The effort required to locate and assemble the responsive records, including the necessity to obtain records from different individuals in different locations;
- The number of responsive records;
- The number and complexity of other requests being handled by the agency;
- The number of agency staff available to respond to the request;
- Funding levels of the agency;
- The risk of interference with the agency's essential functions and the risk of unreasonable disruption of the agency's normal obligations.

23. In light of the facts set forth in the Declarations submitted to the Court, based on its review of these factors, the Court determines that, thus far, the agency is acting diligently in response to Health Pros Northwest, Inc.'s public records request.

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FOURTH ISSUE: ATTORNEY'S FEES

24. RCW 42.56.550(4) provides:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

25. Health Pros is entitled to an award of attorney's fees and costs under this statute as to the issue on which it has prevailed.

26. The parties stipulate and agree that Health Pros should be awarded $10,000.00 in attorney's fees reflecting those fees properly attributable to Health Pros's work on the issue on which it prevailed.

27. In addition, the Court should award Health Pros one-half of the litigation costs it has incurred in the total amount of $212.50.

28. Any conclusion of law that is more properly described as a finding of fact is hereby adopted as such.

IV. ORDER AND JUDGMENT

Based on the foregoing findings and conclusions, the Court ENTERS, and DIRECTS THE CLERK TO ENTER, JUDGMENT as follows:

1. The Court DECLARES that the agency, in violation of RCW 42.56.520(1)(c), failed to provide Health Pros Northwest, Inc. a response within five business days that provided an estimate of when the agency would begin producing records responsive to Health Pros Northwest, Inc.'s request.

2. The Court DECLARES that Health Pros Northwest, Inc. is entitled to an award of its reasonable attorney's fees related to the litigation of the above issue in the amount of $10,000.00 and is entitled to costs in the amount of $212.50, and the Court hereby ENTERS, and DIRECTS THE CLERK TO ENTER, JUDGMENT in favor of Health Pros Northwest, Inc. and against the State of Washington and its Department of Corrections, for those attorney's fees and costs. Interest shall accrue on the amounts awarded at the rate of 12% per annum until paid.

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3. The Court DECLARES that RCW 42.56.520(3), as construed by the Court of Appeals in *Hobbs v. State*, 183 Wn.App. 925, 335 P.3d 1004 (2014), only requires an agency to provide an estimate of when it will produce its *first* installment of records responsive to the public records request, and does not require the agency to produce an estimate of when it will *finish* producing records responsive to such a request, such that the Court has no jurisdiction to compel the agency to provide such an estimate.

4. The Court DECLARES that the agency has, thus far, acted with reasonable diligence in response to Health Pros Northwest, Inc.'s public records request.

5. THIS CONSTITUTES THE COURT'S FINAL JUDGMENT IN THIS CASE.

DATED this 5 day of October, 2017.

The Honorable James J. Dixon, Judge

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PRESENTED BY AND APPROVED AS TO FORM ONLY: RIGHT TO APPEAL RESERVED:

Matthew B. Edwards, WSBA No. 18332
Attorney for Plaintiffs Health Pros Northwest, Inc.

APPROVED AS TO FORM ONLY, NOTICE OF PRESENTATION WAIVED AND RIGHT TO APPEAL RESERVED:

Douglas W. Carr, WSBA No. 17378
Assistant Attorney General
Attorney General's Office
Corrections Division

per attached e mail authorization

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EXHIBIT G

☐ EXPEDITE
☐ Hearing is set:
Date: _____
Time: _____
Judge/Calendar:
☒ No Hearing is set

SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

HEALTH PROS NORTHWEST, INC., a Washington corporation,

Plaintiff,

v.

THE STATE OF WASHINGTON and its DEPARTMENT OF CORRECTIONS,

Defendants.

WASHINGTON STATE SUPREME COURT CAUSE NO. _____

THURSTON COUNTY CAUSE NO. 17-2-02480-34

NOTICE OF APPEAL -- WASHINGTON STATE SUPREME COURT

Health Pros, Plaintiff herein, hereby appeals the Judgment in Public Record Act Case Granting Relief in Part and Denying Relief in Part dated September 8, 2017. Health Pros appeals only from the Superior Court's resolution of the second and third issues described in the Conclusions, and from the corresponding paragraphs 3 and 4 of the Judgment. Health Pros further states its intent to seek direct review by the Washington State Supreme Court.

A copy of this Judgment is attached to this Notice.

DATED this 16 day of October, 2017.

OWENS DAVIES, P.S.

Matthew B. Edwards, WSBA No. 18332
Attorneys for Plaintiff Health Pros Northwest, Inc.

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DECLARATION OF SERVICE

I, Jordannah Bangi Jauch, certify and declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on October 16, 2017, I caused service of the foregoing document to the following individuals in the manner described below:

Douglas W. Carr
Attorney General's Office
Corrections Division
PO Box 40116
Olympia WA 98504-0116

Via US Mail

DATED this 16th day of October, 2017, at Olympia, Washington.

Jordannah B. Jauch
Jordannah Bangi Jauch, Legal Assistant

OWENS DAVIES, P.S.
1115 West Bay Drive, Suite 302
Olympia, Washington 98502
Phone: (360) 943-8320
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I certify under penalty of perjury of the laws of the State of Washington that on the 22nd day of December, 2017, I caused a true and correct copy of Appellants Health Pros Northwest, Inc.'s Opening Brief to be served on the following person(s) in the manner indicated below:

Timothy J. Feulner
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116

via electronic upload to the Appellate Courts' upload portal.

By: _____
Matthew B. Edwards
Signed at Olympia, Washington

OWENS DAVIES P. S.

December 22, 2017 - 3:46 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Health Pros Northwest, Inc. v State of Washington, et al
Superior Court Case Number:	17-2-02480-2

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